CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd and other appeals

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEALS NO 02–2 OF 2001(A), NO 02–3 OF 2001(W) AND NO 02–4 OF 2001(W)

STEVE SHIM CJ (SABAH & SARAWAK), ABDUL MALEK AHMAD AND SITI NORMA YAAKOB FCJJ

8 FEBRUARY 2002

Companies and Corporations — *Winding up — Proceedings against company — Leave to continue proceedings — Company initiated proceedings in court before winding up order made against it — Judgment in favour of company — Appeal by defendant against judgment — Whether leave of winding up court required for defendant to file appeal — Companies Act 1965 s 226(3)*

The respondent insured its warehouse, forklift and stock-in-trade ('the assets') with Provincial Insurance ('Provincial') and CGU Insurance ('CGU'). On 11 September 1989, a fire destroyed the assets and as a result thereof, the respondent sued Provincial and CGU at the Kuala Lumpur High Court ('KL suit') and the Ipoh High Court ('Ipoh suit') respectively. Thereafter, in October 1992, the respondent was wound up pursuant to a winding up order of the Kuala Lumpur High Court ('the winding up court'). Provincial and CGU then applied for security of costs to be borne by the respondent in each case. The Ipoh High Court dismissed CGU's application and held that s 226(3) of the Companies Act 1965 ('the Act') made it mandatory for leave of the winding up court to be obtained before making the application. The Kuala Lumpur High Court, on the other hand, took a different view and accordingly allowed Provincial's application. The respondent filed an appeal to the Court of Appeal against the decision of the Kuala Lumpur High Court and the appeal was subsequently allowed. In the meantime, the trial at the Ipoh High Court proceeded and judgment was finally given in favour of the respondent. CGU filed an appeal to the Court of Appeal against that decision but the respondent applied to strike out CGU's appeal on the ground that CGU had not obtained leave of the winding up court pursuant to s 226(3) of the Act. The Court of Appeal allowed the application and consequently struck out the appeal with costs (see [2001] 1 MLJ 511). Leave to appeal was granted by the Federal Court on the following questions: (a) whether an appeal against the decision in favour of a company under liquidation fell within the meaning of the phrase 'action or proceeding' in s 226(3) of the Act, so that no appeal could be prosecuted without leave under the said provision; and (b) whether an application for security for costs by a defendant in an action commenced by a company under liquidation fell within the meaning of the phrase 'action or proceeding' in s 226(3) of the Act, so that no application for security for costs could be commenced and/or proceeded with, without leave under the said provision.

Held, allowing the appeal:

(1) It was necessary to focus on the whole phrase 'action or proceeding ... proceeded with or commenced against the company' in s 226(3) of the Act instead of considering the meaning of the word 'proceeding' per se. It was crucial to examine the word 'proceeding' in tandem with the words 'against the company' in s 226(3) of the Act (see p 7D).

(2) The 'defensive action' approach enunciated in *Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141 and *Rahmat Ali Fatehullah v Calcutta National Bank Ltd* AIR 1955 All 169 stipulated that it would be necessary to obtain leave of the winding up court whenever any legal proceeding had to be instituted or continued against the company. On the other hand, where the company had instituted proceedings, which it could do without obtaining leave from the winding up court, there was no necessity for the defendant in the action to obtain leave for any defensive proceedings on its part (see pp 7E–9C).

(3) The approach adopted in *Humber* and *Rahmat Ali* was preferred. Although an appeal or an application for security of costs could be construed as a 'proceeding' per se, nevertheless, it was essential to determine whether it was a proceeding being instituted or commenced against the company under liquidation. This in turn depended on whether the proceeding was in the nature of a defensive action or otherwise. In the Ipoh suit, the appeal lodged by the appellant was not a proceeding intended to fasten liability on the respondent or its assets but was essentially a proceeding commenced or instituted by the appellant with the object of exculpating itself from liability arising out of an action commenced by the respondent. Clearly, the appeal was in the nature of a defensive action. In the circumstances, neither the appeal nor the application for costs fell within the meaning of the phrase 'action or proceeding ... proceeded with or commenced against the company' in s 226(3) of the Act. Therefore the answers to both the questions were in the negative (see pp 9G–10C).

[Bahasa Malaysia summary

Penentang menginsuranskan gudang, jentera pencakar dan stok semasanya ('aset tersebut') dengan Provincial Insurance ('Provincial') dan CGU Insurance ('CGU'). Pada 11 September 1989, suatu kebakaran telah memusnahkan aset tersebut dan akibatnya, penentang mendakwa Provincial dan CGU di Mahkamah Tinggi Kuala Lumpur ('KL suit') dan Mahkamah Tinggi Ipoh ('guaman Ipoh') masing-masing. Selepas itu, pada bulan Oktober 1992, penentang digulung menurut satu perintah penggulungan Mahkamah Tinggi Kuala Lumpur High Court ('mahkamah penggulungan').

A Provincial dan CGU kemudiannya memohon supaya sekuriti untuk kos ditanggung oleh penentang dalam setiap kes. Mahkamah Tinggi Ipoh menolak permohonan CGU dan memutuskan bahawa s 226(3) Akta Syarikat 1965 ('Akta tersebut') menjadikannya wajib untuk kebenaran mahkamah penggulungan diperolehi sebelum membuat permohonan tersebut. Sebaliknya, Mahkamah Tinggi Kuala Lumpur, B mengambil pandangan berlainan dan membenarkan permohonan Provincial. Penentang memfailkan rayuan kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi Kuala Lumpur dan rayuan tersebut seterusnya dibenarkan. Sementara itu, perbicaraan di Mahkamah Tinggi Ipoh berlangsung dan penghakiman akhirnya C diberikan memihak kepada penentang. CGU memfailkan satu rayuan kepada Mahkamah Rayuan terhadap keputusan tersebut tetapi penentang memohon untuk membatalkan rayuan CGU atas alasan bahawa CGU tidak memperolehi kebenaran daripada mahkamah penggulungan menurut s 226(3) Akta tersebut. Mahkamah Rayuan membenarkan permohonan dan seterusnya membatalkan rayuan D dengan kos (lihat [2001] 1 MLJ 511). Kebenaran untuk merayu dibenarkan oleh Mahkamah Persekutuan atas soalan-soalan berikut, iaitu sama ada: (a) suatu rayuan terhadap keputusan tersebut yang memihak kepada sebuah syarikat di bawah pembubaran dirangkumi oleh ungkapan 'action or proceeding' dalam s 226(3) Akta tersebut, di mana tiada rayuan boleh dibicarakan tanpa kebenaran di bawah E peruntukan tersebut; dan (b) satu permohonan untuk sekuriti untuk kos oleh defendan dalam satu tindakan yang dimulakan oleh sebuah syarikat di bawah pembubaran dirangkumi oleh ungkapan 'action or proceeding' dalam s 226(3) Akta tersebut, di mana tiada permohonan untuk sekuriti untuk kos boleh dimulakan dan/atau diteruskan, tanpa kebenaran di bawah peruntukan tersebut. F

Diputuskan, membenarkan rayuan tersebut:

(1) Adalah perlu untuk menumpu perhatian terhadap keseluruhan ungkapan 'action or proceeding ... proceeded with or commenced against the company' dalam s 226(3) Akta tersebut dan bukan G hanya menimbang maksud perkataan 'proceeding' sahaja. Adalah penting untuk meneliti perkataan 'proceeding' bersama dengan perkataan-perkataan 'against the company' dalam s 226(3) Akta tersebut (lihat ms 7D).

(2) Pendekatan 'tindakan pertahanan' (defensive action) yang H dilafazkan dalam *Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141 dan *Rahmat Ali Fatehullah v Calcutta National Bank Ltd* AIR 1955 All 169 menyatakan adalah perlu untuk memperolehi kebenaran mahkamah penggulungan apabila saja apa-apa prosiding undang-undang hendak dimulakan atau diteruskan terhadap syarikat tersebut. Sebaliknya, di mana syarikat tersebut I telah memulakan prosiding, yang mana ia boleh berbuat demikian tanpa memperolehi kebenaran daripada mahkamah penggulungan, tiada keperluan untuk defendan dalam tindakan

tersebut untuk memperolehi kebenaran untuk apa-apa prosiding pertahanan pada pihaknya (lihat ms 7E–9C). A

(3) Pendekatan yang digunakan dalam *Humber* dan *Rahmat Ali* lebih diutamakan. Biarpun satu rayuan atau permohonan untuk sekuriti untuk kos boleh ditafsirkan sebagai satu 'prosiding', namun demikian, adalah perlu untuk memutuskan sama ada ia merupakan prosiding yang sedang dimulakan terhadap syarikat di bawah pembubaran tersebut. Ini pula bergantung pada sama ada prosiding tersebut adalah bersifat tindakan pertahanan atau sebaliknya. Dalam guaman Ipoh, rayuan yang dikemukakan oleh perayu bukanlah satu prosiding yang bertujuan mengenakan liabiliti pada penentang atau asetnya tetapi pada dasarnya suatu prosiding yang dimulakan oleh perayu dengan tujuan membebaskan dirinya daripada liabiliti yang timbul daripada satu tindakan yang dimulakan oleh penentang. Dengan jelas, rayuan ini adalah bersifat tindakan pertahanan. Dalam keadaan ini, baik rayuan mahupun permohonan untuk kos tidak jatuh dalam linkungan maksud ungkapan 'action or proceeding ... proceeded with or commenced against the company' dalam s 226(3) Akta tersebut. Maka jawapan kepada kedua-dua soalan adalah dalam negatif (lihat ms 9G–10C).] B C D

Notes E

For cases on proceedings against a company under liquidation, see 3(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1078–1081.

Cases referred to F

CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd [2001] 1 MLJ 511 (refd)

Humber & Co v John Griffiths Cycle Co (1901) 85 LT 141 (folld)

Rahmat Ali Fatehullah v Calcutta National Bank Ltd AIR 1955 All 169 (folld)

Rawat Raj Kumar Singh & Ors v Benares Bank Ltd, Benares (in liquidation) & Ors AIR 1941 All 154 (refd) G

Legislation referred to

Companies Act [India] s 171

Companies Act 1965 s 226(3) H

Courts of Judicature Act 1964 s 3

Appeal from: Civil Appeals No A–02–338 of 2000, No W–02–115 of 2000 and No W–02–29 of 2000 (Court of Appeal, Kuala Lumpur)

Porres Royan (*Anad Krishnan, T Sudharsanan* and *Michael Lum Kah Heng*) (*Shook Lin & Bok*) for the appellant. I

CK Leong (*Christopher Fernando* with him) (*CK Leong & Co*) for the respondent.

Rishwant Singh watching brief for the General Insurance Association of Malaysia.

Zakaria bin Merican (*Lee Eng Huat* with him) watching brief for the Central Bank of Malaysia.

Steve Shim CJ (Sabah & Sarawak): There are three appeals before us, all involving the same issue of law. As such, we propose to deal with them together. Leave to appeal was granted by the Federal Court on 22 February 2001 on the following questions:

(1) whether an appeal against the decision in favour of a company under liquidation falls within the meaning of the phrase 'action or proceeding' in s 226(3) of the Companies Act 1965 ('the Act'), so that no appeal could be prosecuted without leave under the said provision;

(2) whether an application for security for costs by a defendant in an action commenced by a company under liquidation falls within the meaning of the phrase 'action or proceeding' in s 226(3) of the Act, so that no application for security for costs could be commenced and/or proceeded with, without leave under the said provision.

Although the questions turn essentially on s 226 of the Act , a brief narrative of the background facts is in order. Asean Security Paper Mills Sdn Bhd (the respondent) was a company set up as an ASEAN Industrial Joint Venture to manufacture high quality security paper. On 6 September 1989, the respondent insured its warehouse, forklift and stock in trade with two insurance companies ie Provincial Insurance ('Provincial') and Commercial Union Assurance (now known as CGU), the appellants herein. On 11 September 1989, a fire destroyed the respondent's warehouse, forklift and stock in trade. In the result, the respondent commenced actions against the appellants ie against CGU in the Ipoh High Court and against provincial in the Kuala Lumpur High Court. On 5 October 1992, the respondent was wound up pursuant to a winding up order of the Kuala Lumpur High Court following which the Official Receiver was appointed the provisional liquidator. Subsequently, one Mr Lim Tian Huat of Messrs Arthur Andersen & Co was appointed Liquidator on 7 September 1993. As a result of the winding-up, both CGU and Provincial applied for security of costs to be borne by the respondent in each case. The Ipoh High Court dismissed CGU's application holding that s 226(3) of the Act made it mandatory for leave of the winding-up court to be obtained before making such an application. However, the Kuala Lumpur High Court took a different view on Provincial's application, by allowing the application and ordering the respondent to provide RM100,000 as security for costs. The respondent appealed to the Court of Appeal. The appeal was allowed. In the meantime, the trial of the Ipoh suit commenced on 18 May 1999 at the end of which the trial judge gave judgment in favour of the respondent in the sum of RM16,124,500 with interests and costs. Against that decision, CGU filed an appeal to the Court of Appeal on 19 May 2000. Then, on 13 September 2000, the respondent applied to strike out the said appeal on the ground that the appellant had not obtained leave of the winding-up

court pursuant to s 226(3) of the Act. The Court of Appeal allowed the application and consequently struck out the appeal with costs.

It seems clear that the main focus in these appeals is this: whether an appeal against the decision in favour of a company under liquidation or an application for security of costs against such a company, falls within the meaning of the phrase 'action or proceeding ... proceeded with or commenced against the company' so that neither form or approach could be undertaken without leave of the winding-up court. Quite obviously, the two questions upon which leave was granted turn very much on the construction to be placed on s 226(3) of the Act. In this connection, the Court of Appeal has clearly taken the stand in the affirmative. This is reflected in the following passages in the judgment of the Court of Appeal, ie *CGU INsurance Bhd v Asean Security Paper Mills Sdn Bhd* [2001] 1 MLJ 511 at pp 516–518, per Mokhtar Sidin JCA which read:

> ... In the present application, it is clear to us that certain restrictions have been imposed by the law on any party commencing or proceeding to take up any action against a company which has wound up. One of them is s 226(3) of the Companies Act. The words in s 226(3) are 'action' and 'proceeding'. Section 3 of the Courts of Judicature Act 1964 ('the CJA'), defines those words as follows:
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> > 'action' means a civil proceeding commenced by writ or in such other manner as prescribed by rules of court but does not include a criminal proceeding;
> >
> > 'proceeding' means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding.
>
> It is clear to us that the CJA defines an appeal as a 'proceeding' within the meaning of s 67 of the CJA. That being the case, any appeal to be proceeded upon is subject to the restrictions imposed ...
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> ... In *Rawat Raj Kumar Singh & Ors v Benares Bank Ltd, Benares (in liquidation) & Ors* 1941 AIR All 154 where it was held that where a decree in favour of a company had been passed and the judgment debtor had appealed from the decree and went on with his appeal at the date of the winding up of the company, he should be regarded as proceeding with legal proceedings against the company and he could not do so without leave of the court. At pp 155–156, Braund J said:
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> > '... The proceeding on foot at the date of the winding-up order was the appeal by the company and it was open to the company to go on with that appeal without the leave of the court. With that introduction, it is possible to see what it was that Lord Davey in his speech actually said. He said this:
> >
> > > "... The respondents, that is to say the company, 'now' object that the present appellants cannot proceed with their appeal without the leave of the court in Ireland. I am of the opinion that the objection cannot be maintained. It was the respondents who themselves proceeded with the action after the winding up order, by prosecuting their appeal in the Court of Appeal, and *when once an action by the company itself has been proceeded with, there is necessity for the defendants* in the action to obtain leave for any defensive proceeding on their part ..."
> >
> > The italics are, of course, my own but in my view, the words they cover afford the clue to what it was that the House of Lords really said in this case.' (Emphasis added.)

A In coming to the conclusions aforesaid, the Court of Appeal has obviously relied on s 3 of the Courts of Judicature Act 1964 ('the CJA') and the Indian case of *Rawat Raj Kumar Singh & Ors v Benares Bank Ltd, Benares (in Liquidation) & Ors* AIR 1941 All 154.

In advancing the proposition that the Court of Appeal has erred in
B relying on s 3 of the CJA, counsel for the appellant submits that the definition of 'proceeding' therein should be confined to the said Act and has no application to s 226(3) of the Act. In rebuttal, counsel for the respondent contends that there is no reason to depart from the interpretation of the word 'proceeding' in s 3 while interpreting that word occurring in s 226(3) of the Act as the context in which the word 'proceeding' has been used in
C s 226(3) of the Act does not call for an interpretation different from the one in s 3 of the CJA. According to him, the meaning is so clear and unambiguous that there is no possibility of construing the word in any other way.

Both counsel seem to have concentrated their efforts solely on the
D proper construction of the word 'proceeding' per se in s 226(3) of the Act. That, in our view, is not entirely adequate. What is on target is to focus on the whole phrase 'action or proceeding ... proceeded with or commenced against the company.' In our view, it is crucial to examine the word 'proceeding' in tandem with the words 'against the company' in s 226(3) of the Act. In this connection, we are particularly attracted by the observations
E of the House of Lords in *Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141 but more significantly, the powerful and well modulated arguments proffered in the Indian case of *Rahmat Ali Fatehullah v Calcutta National Bank Ltd* AIR 1955 All 169.

In *Humber*, the respondent company was wound up during the
F pendency of their appeal to the Court of Appeal. The respondent won the appeal and this prompted the appellant to appeal to the House of Lords. The respondent then raised a preliminary objection contending that leave of the winding-up court was necessary before the appellant could proceed with the appeal. In dealing with the said preliminary objection, Lord Davey said this:

G > I am of opinion that the objection cannot be maintained. It was the respondent who themselves proceeded with the action after the winding up order by prosecuting their appeal in the Court of Appeal and when once an action by the company itself has been proceeded with, there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their part.

H In *Rahmat Ali*, the Full Bench of the Allahabad High Court had embarked on an exhaustive and comprehensive review of the whole range of options decided in previous cases including *Humber* and *Rawat Raj Kumar* in construing s 171 of the Indian Companies Act (which is in pari materia with our s 226(3) of the Act) and finally came to the following conclusions:

I > Whenever a matter comes up before a court and an objection is taken that leave under s 171 Companies Act had not been obtained, the court has to decide whether it is a suit or other legal proceeding against the company. If

the words 'against the company' merely mean that the company is arrayed as the opposite party, as was held by Braund J, permission of the company judge would be necessary whenever any legal proceeding has to be instituted or continued against the company. That this could not be the meaning is obvious from the fact that where the company has come to court and has instituted the proceeding, which it can do without the leave of the company judge, the defendant will be required to take his permission to institute or continue any legal proceeding to defend himself. To hold that would put the defendant in a difficult position and it would be necessary, before he can take any proceeding against the company even by way of defence or to disprove the company's claim or to get some order passed in favour of the company vacated, to take the permission of the company judge.

The words 'against the company' must mean a proceeding where the liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself. It would probably be useful to clarify the position a little further. If a person wants to file a suit to escape liability on the ground that the company's claim against him is unfounded, it is a proceeding against the company, but where the company has started the proceeding, that is, put forward its claim in a court of law, any remedy available by way of defence to escape liability, which the company wants to fasten on him, should not be deemed to be a proceeding commenced or continued against the company and in such a case, the question whether the claim was put forward or the suit was filed by the company before or after the winding up order, should make no difference.

In (1901) 85 LT 141 (J), Lord Davey said:

> 'It was the respondents who themselves proceeded with the action after the winding up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with, there is no necessity for the defendants in that action to obtain leave for any defensive proceeding on their part.'

Braund J distinguished those observations and confined them to a case where the action had been taken by the company and proceeded with after the winding-up order. As Lord Davey was merely stating the facts of the case before him, he should not be understood to have meant that if the appeal had been filed and proceeded with by the company before the winding-up order, his decision would have been the other way.

This appears to us to be also just and proper as in such a case, it is the company which wants to fasten the liability while the person against whom such liability is attempted to be fastened, in a legal proceeding pending in a court, wants to escape that liability. Liquidation proceedings under the Companies Act are for making available the assets of the company in *pari passu* satisfaction of its liabilities, and if persons other than secured creditors are allowed to enforce their claims without any control exercised by the company judge, it may defeat or delay that object. But where a company has initiated a proceeding in a court of law whether before or after the winding up order, no permission of the company judge should be needed for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him.

If, however, the proceedings in a court of law are started by a person other than the company, either with the object of fastening a liability on the company or with the intention of escaping a liability in respect of a claim

> which has not been brought into court by the company itself, the permission of the company judge is required for the institution or the continuance of the proceedings. For instance, if a person files a suit for a declaration that the company owes to him a certain sum of money or that he does not owe the company any sum of money, the permission of the company judge is necessary. If, however, the company has instituted a suit or other proceeding to enforce a claim, any action taken by the defendant or the opposite party by way of defence, or if the company has obtained a decree or order, any defensive action by way of appeal, revision, review or setting aside of an exparte decree or order, should not require the permission of the company judge.

Clearly, *Rahmat Ali* and *Humber* have enunciated what can be termed as the 'defensive action' approach. Such an approach seems to strike a balance between the need to protect the interests of the company under liquidation on the one hand and render due justice to a defendant on the other.

As we said, the Court of Appeal, in the instant case, did not address itself to the cases aforesaid, but relied essentially on *Rawat Raj Kumar* citing, in support, the passages reproduced earlier. In this regard, we should perhaps draw attention to Braund J's citation of Lord Davey's observations in *Humber* which, for the sake of emphasis, requires repetition herein:

> ... The respondents, that is to say the company 'now' object that the present appellants cannot proceed with their appeal without the leave of the court in Ireland. I am of the opinion that the objection cannot be maintained. It was the respondents who themselves proceeded with the action after the winding up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with, *there is necessity for the defendants* in the action to obtain leave for any defensive proceeding on their part ... (Emphasis added.)

Quite clearly, there is a serious omission in the citation underscored above. The original report in *The Law Times* on *Humber* quoted Lord Davey as having actually stated that 'there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their part.' The omission of the word 'no' places an entirely different complexion on the views expressed by Lord Davey. It has created a distorted reflection of his views. The misquote has rendered the conclusions arrived at by Braund J in *Rawat Raj Kumar* totally unreliable. In the circumstances, the Court of Appeal's reliance on *Rawat Raj Kumar* must be regarded as being inappropriate and misconceived.

Having considered the relevant authorities, we prefer the approach adopted in *Humber* and *Rahmat Ali*. Although we accept that an appeal or an application for security of costs can be construed as a proceeding per se, nevertheless it is essential to determine whether it is a proceeding being instituted or commenced against the company under liquidation in s 226(3) of the Act and that must necessarily depend on whether the said proceeding is in the nature of a defensive action or otherwise. The factual circumstances therefore come into play. In the Ipoh suit, the facts show that the appeal lodged by the appellant is not a proceeding intended to fasten liability on the respondent (the company under liquidation) or its assets but is

essentially a proceeding commenced or instituted by the appellant with the object of exculpating itself from liability arising out of an action commenced or initiated by the respondent. The appellant is not a claimant as such nor is it a creditor of the respondent. It is not seeking to make any inroads into the assets of the respondent but merely to set aside a liability pinned on it by virtue of a successful action brought against it by the respondent. Clearly, the appeal is in the nature of a defensive action. The same must apply to the application for security of costs lodged by the appellant in the Kuala Lumpur suit. In the circumstances, we take the view that the appeal or the application for security of costs does not fall within the meaning of the phrase 'action or proceeding ... proceeded with or commenced against the company' in s 226(3) of the Act.

Given the conclusions above and for the reasons stated, the answers to both the questions posed for our consideration must be in the negative. Accordingly, the appeals are allowed with costs and the deposits refunded to the appellants.

Appeal allowed.

Reported by Lim Lee Na